

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

76-4049

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket Nos. 76-4049
76-4061
76-4074

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC. and
WESTERN UNION INTERNATIONAL, INC.,
against *Petitioners,*

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
XEROX CORPORATION,
HAWAIIAN TELEPHONE COMPANY and
AMERICAN PETROLEUM INSTITUTE,
Intervenors.

PETITIONS FOR REVIEW OF A REPORT AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

**BRIEF FOR PETITIONER
ITT WORLD COMMUNICATIONS INC.**

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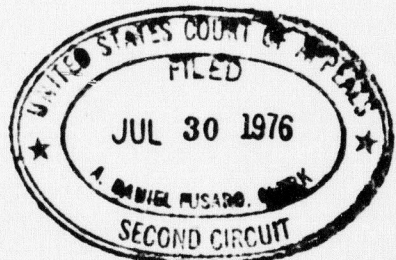


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**BRIEF FOR PETITIONER
ITT WORLD COMMUNICATIONS INC.**

Preliminary Statement

Petitioner ITT World Communications Inc. ("ITT Worldcom") submits this brief in support of its petition to reverse a Report and Order (the "Order") released by the Federal Communications Commission (the "FCC" or the "Commission") on January 19, 1976,¹ and in support

1. The Order is officially reported at 57 F.C.C.2d 705 (1976), and is reproduced in the Joint Appendix herein at pp. A-1-9. Subsequent references in the form "A" followed by page numbers are to the Joint Appendix.

of the similar petitions of RCA Global Communications, Inc. ("RCA Globecom") and Western Union International, Inc. ("WUI") which are also before the Court in this consolidated proceeding. In its Order, the FCC reversed its precedents prohibiting intervenor American Telephone and Telegraph Company ("AT&T") from furnishing international alternate voice-data communication services in competition with ITT Worldcom, RCA Globecom and WUI, and directed the Chief of its Common Carrier Bureau to accept for filing applications from AT&T and petitioners to provide designated alternate voice-data services.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the FCC acted arbitrarily and capriciously when it departed, without adequate explanation, from its prior determinations that AT&T should be excluded from the international alternate voice-data market.

2. Whether the FCC failed to follow procedures required by law for the resolution of issues concerning the anticompetitive effects of its decision,

- (a) By giving inadequate consideration to AT&T's monopoly status and its anticompetitive interconnection and cross-subsidization practices;
- (b) By deciding antitrust issues with which it was presented on the basis of a burden of proof analysis; and
- (c) By failing to consider alternative methods of providing international alternate voice-data service which are less restrictive of competition.

3. Whether the FCC acted arbitrarily and capriciously and failed to follow procedures required by law when it departed from its announced intention of formulating a

statement of policy which would not be applied until the carriers filed applications to provide international alternate voice-data services, and effectively decided such applications in advance of filing, without notice, comparative consideration, findings or hearings.²

STATEMENT OF THE CASE

ITT Worldcom is one of several common carriers of international record communications regulated by the FCC pursuant to Part II of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201 *et seq.*³

The "record communication" business in which ITT Worldcom and the other international record carriers ("IRCs") are engaged consists primarily of the transmission and reception of data (usually in hard copy or "record" form) by electro-mechanical devices. Record communications are commonly distinguished from "voice communications," which are the principal business of intervenor AT&T, also a common carrier of communications subject to FCC regulation. In voice communications, the electro-mechanical transmitter used in record communications is replaced by an electro-acoustical transmitter which is activated by the human voice, and the electro-mechanical receiver is replaced by an electro-acoustical transducer which converts the transmitted electrical signal into sounds audible to the human ear.⁴

2. The statutes which are relevant to the Court's resolution of the issues presented for review are reproduced in full as an Appendix to the Brief of Petitioner RCA Globcom.

3. Included among the other IRCs are RCA Globcom and WUI, the petitioners in the consolidated cases.

4. While both voice and record communications may be transmitted over the same electrical circuits, the reliance on the "intelligent agency" of the human mind as part of the system of transmitting and receiving voice communications means that voice and record communications each have different technological requirements. Errors and distortion in transmission, such as bursts of noise, echoes and cross-talk, which are tolerable in telephone communications

At issue in this case is a hybrid form of communications service by means of which the general public, using the telephone handset, can transmit or receive either voice or record communications alternately over the same electrical circuit.⁵ AT&T provides such a service within the United States under the name "Dataphone," as part of its

because of the ability of the customer to interpret, analyze and fill in gaps in communication by experience and inference, are intolerable in data communications in the absence of specially selected circuits or special equipment designed to monitor and modify the transmission and reception as occasion requires. (A-209-212) As stated in one basic text, Martin, *Telecommunications and the Computer*, 216-217 (1st Edition 1969):

"Voice transmission differs from data transmission in two fundamental ways. First, with voice transmission we have an intelligent agency at each end of the line. If a burst of noise or other failure prevents the listener from hearing a word he can either guess what the word should have been, or else ask the speaker to repeat it. If he cannot hear he will ask the speaker to speak louder. This highly flexible intelligence does not exist when machine talks to machine, so control procedures must be devised which are as fail-safe as possible. Second, the information conveyed by the human voice is at a very much slower rate than that at which we want the machines to 'talk.' The normal rate of speaking is equivalent to something like 40 bits per second of written words, and this is 'coded' with a very high degree of redundancy. We can usually follow the meaning of what is being said if we hear only about half of the words. Data transmission, on the other hand, over voice channels can take place at 2400 bits per second and higher. It is because of the low rate of information in speech, and because of the adaptability of the human ear, that distortions and noise levels damaging to data transmission have been quite acceptable in the engineering of the world's telephone lines."

5. The particular alternate voice-data service at issue here is a so-called "switched message" service, which means that each time a customer wishes to use the service, he must establish a circuit between his telephone apparatus and the recipient by placing a toll call through a switching system. "Switched" communications services are distinguished from "private line" services, which offer the customer the opportunity to lease a permanent communication channel between two points which is dedicated to his exclusive use. The IRCs have for some years provided a private line alternate voice-data service commonly known as "AVD", and the FCC has prevented AT&T from competing with the IRCs to offer that service. See p. 8, *infra*.

virtual monopoly of domestic voice communications. AT&T's Dataphone service is offered subject to certain limitations on the speed of data transmission designed to protect the domestic record carrier, The Western Union Telegraph Company ("Western Union") from competition.⁶ The IRCs provide a similar service known as "Datel" internationally,⁷ subject to certain restrictions on the purposes for which voice communications can be transmitted and received in connection with the service.⁸ This review proceeding involves the question whether the monopolistic domestic voice carrier, AT&T, or the several IRCs, competing among themselves, will provide international alternate voice-data service in the future.

The Notice of Inquiry. On July 31, 1972, stating that it was acting as a result of a letter dated June 17, 1971 from intervenor Xerox Corporation,⁹ the FCC initiated the proceeding which three years later resulted in the Order now before this Court. Xerox's letter, as paraphrased by the FCC, requested the FCC—

“...to give consideration to the removal of existing limitations which restrict the public's use of the switched telephone network from the overseas trans-

6. Under agreements with Western Union, AT&T is prohibited from using dataphone printers operating at teleprinter speeds of less than 300 “bits” per second (A-248). “Bit” is a contraction of “binary digit”, the smallest unit of information in a binary system of communication. Martin, *op. cit.* at 439.

7. Datel is a “switched” communication service, as is AT&T's Dataphone service. See n. 5, *supra*.

8. Under the applicable tariffs, voice can be used in connection with Datel services only to assist in the mechanics of establishing and terminating data communications between the parties. (A-95)

9. As here relevant, Xerox Corporation is a manufacturer of equipment including, most prominently, telecopier machines which have been used to transmit and receive data, including facsimile copies of documents, via intervenor AT&T's domestic Dataphone system. (A-28)

mission of data and facsimile signals alternately with voice." (A-10)

When circulated by the FCC to interested parties, Xerox's letter resulted in numerous comments and responses, both from petitioners herein and from intervenor AT&T, which led the FCC to conclude —

"that there are numerous factors to be considered in determining whether or not dataphone or a similar service should be authorized to new overseas points, and which carrier, or carriers should be authorized to provide the service." (A-14)

However, rather than determining whether Dataphone-type service should be authorized or considering which carriers should provide it, the FCC decided that it should first formulate a statement of policy which would guide its Common Carrier Bureau's subsequent consideration¹⁰ of applications by the various carriers to offer alternate voice-data services.¹¹ Thus, in a "Notice of Inquiry into Policy to be Followed in Future Authorization of Overseas Dataphone Service,"¹² the FCC stated:

"[W]e do not believe the processing of individual applications would be a satisfactory method of arriving at policy determinations in this matter. . . . We

10. The Commission has delegated responsibility for considering applications to offer new communications services to its Common Carrier Bureau, and that Bureau's Chief. 47 C.F.R. §§ 0.91, 2.91. Carriers are required to file such applications prior to initiating new services by Section 214 of the Communications Act, 47 U.S.C. § 214.

11. A policy statement in administrative law is an agency statement, to be distinguished from either a rulemaking or adjudication, addressed to its own employees, providing them with directions in their future implementation of the laws which the agency is charged with administering. *Pickus v. Board of Parole*, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972). As noted *infra* p. 45, less formal procedural requirements apply to declarations of agency policy than to other proceedings.

12. A-10-16.

feel that we can best resolve the various questions by adopting policies governing the provision of data-phone service rather than in passing on separate applications by the carriers to provide such service." (A-13-14)

The FCC therefore refused to consider an application filed by one carrier to provide alternate voice-data service¹³ and instead called upon interested parties to supply written comments on a series of subjects. Among the matters as to which the FCC requested comments were the nature and extent of the demand for an international alternate voice-data service, current public usage of that service domestically, the technological problems presented by the use of satellites in connection with such service, the carriers' anticipated costs, charges, revenues, operating methods, and relative efficiencies, the arrangements the carriers would make with overseas correspondents in connection with providing such service, the estimated number of additional circuits required to provide such service, and the effect on each carrier of not being granted an exclusive authorization to render such service. (A-14-15)

The Comments of Interested Parties. In response to this Notice of Inquiry, comments and replies were filed by some fifteen parties, including the principal international and domestic carriers of record and voice communications, the Communications Satellite Corporation and various manufacturers of equipment associated with alternate voice-data technology, as well as trade associations of carriers, equipment manufacturers and users of such services. All

13. At the time the FCC's Notice of Inquiry was issued, WUI had filed an application pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, for authority to provide a public alternate voice-data service. (A-13)

of the petitioners and intervenors herein submitted comments in the FCC's policy-making proceeding.¹⁴

The principal comments made by the IRCs, the petitioners in this review proceeding, related to a prior determination made by the FCC, the so-called TAT-4 decision,¹⁵ which prevented AT&T from competing with the IRCs to offer an international leased-channel alternate voice-data service commonly referred to as "AVD".¹⁶ In the TAT-4 proceeding, AT&T, which was then providing international AVD service to one customer, the United States Defense Department, sought permission to lease AVD channels to the general public in competition with the IRCs. The FCC decided that, due to the competitive inequality between the IRCs and AT&T, AT&T's request for unrestricted authority to offer AVD service should be denied¹⁷ and, moreover, its existing authorization to serve the Department of Defense should be limited to the circuits then in place.¹⁸ In support of its decision to keep AT&T out of the alternate voice-data market, the FCC first took note of AT&T's domestic monopoly and the opportunities it afforded AT&T

14. In addition to the intervenors already mentioned, motions to intervene in this proceeding have been granted to Hawaiian Telephone Company, a domestic voice carrier, and American Petroleum Institute, a trade association representing potential users of such service.

15. *American Telephone and Telegraph Co.*, 37 F.C.C. 1151 (1964). The proceeding is referred to as the TAT-4 case because one of the matters with which it dealt was the installation of the fourth transatlantic telephone cable. 37 F.C.C. at 1151.

16. As mentioned above, the AVD service considered in TAT-4 is essentially similar to the alternate voice-data service at issue here, in that the subscriber may use the same circuit to transmit either voice or data messages. However, the AVD subscriber leases a circuit between two points which is dedicated to his exclusive use, while the Dataphone user must put through a toll call over the switched-message telephone network each time he wishes to transmit a message.

17. 37 F.C.C. at 1160.

18. 37 F.C.C. at 1161.

to completely eliminate the IRCs from the market. Thus, the FCC stated:

"The [IRC]s express the understandable concern that AT&T, with its vast nationwide domestic network and its large sales force, is in a position to obtain the lion's share, if not all, of the business generated by this new service." 37 F.C.C. at 1158.

In addition, the FCC noted that, even apart from relative economic strength, statutory restrictions on the scope of the IRCs' activity within the United States would hinder their ability to compete with AT&T. In this connection, the FCC observed:

"The international record carriers are confined to doing business, for the most part, to the three so-called 'gateway' cities of New York, San Francisco and Washington, D.C. It is true that they employ sales forces outside of the gateway cities in the 'hinterland', but it is also clear that these do not compare in any sense, and cannot compete effectively, with the far larger resources of AT&T." 37 F.C.C. at 1158.

As a result, the FCC noted:

"A realistic appraisal of the relative capabilities of AT&T and the record carriers to secure and maintain such business leads us to conclude that AT&T's entry into this service would seriously jeopardize the ability of the record carriers to obtain a meaningful share of the business. In this connection we note that the total overall revenues of the Bell System for 1963 were some \$9.6 billion. Its revenues derived from its overseas services for that year were \$65.5 million, or much less than 1 percent of its total revenues. The amount of such overseas revenues derived from record services is a small portion of this latter amount. Loss of the revenue derived from these record services would have an inconsequential impact on the overall revenue picture of the Bell

System. The provision of overseas telegraph services is, however, for the most part, 100 percent of the business of the international record carriers, and a significant loss in their participation in the telegraph business could have a serious effect on the viability of the international telegraph industry as a whole. This is a risk the record carriers should not be called upon to take, particularly in view of the fact that a substantial portion of this business will be diverted from existing overseas services." 37 F.C.C. at 1159.

Finally, the FCC concluded by saying:

"It is in the public interest that we assure the viability of the record carriers by protecting them from the losses they would inevitably suffer were AT&T permitted to provide this voice-record service. These losses could affect their ability to continue to provide the still important overseas message telegraph service at anything approximating current rates. We note that when we permitted AT&T and the record carriers to compete for the business of the defense agencies for leased circuits for alternate and simultaneous voice-record use, AT&T received all the leases despite the fact that it was then authorized to provide circuits to the international record carriers for their use in competing with it for this business." 37 F.C.C. at 1159.

As the IRCs noted in the comments they submitted in response to the Notice of Inquiry, none of the factors emphasized by the FCC in its TAT-4 decision had changed in a way which reduced the threat to the IRCs the FCC perceived in TAT-4. Thus, as the IRCs noted, AT&T's "vast nationwide domestic network and its large sales force" were undiminished.¹⁹ The IRCs remained confined

19. As ITT Worldcom noted, AT&T, employed over 1,000,000 persons in 1971 and enjoyed annual revenues of \$19 billion on a capital investment of \$60 billion. By way of contrast, in the same year the IRCs had combined revenues of \$206 million on a combined investment of \$387 million, and employed a total of 7,000 persons. (A-89)

to the limited number of "gateway" cities where the FCC had authorized them to conduct their business.²⁰ AT&T's revenues from its overseas services remained small in proportion to its total revenues. As the same time, overseas record services continued to constitute close to 100% of the business of the IRCs. By reason of all of these factors, the IRCs requested the FCC to abide by its determination in TAT-4 that:

"It is in the public interest that we assure the viability of the record carriers by protecting them from the losses they would *inevitably* suffer were AT&T permitted to provide this voice-record service." 37 F.C.C. at 1159. (Emphasis supplied.)

Beyond demonstrating the continued applicability of the TAT-4 decision, the IRCs called the Commission's attention to additional considerations which, even in the absence of TAT-4, would have mandated a policy excluding AT&T from the international alternate voice-data market. Thus, the IRCs pointed out that as a result of AT&T's monopolistic control over the domestic telephone network, the IRCs could not offer an alternate voice-data service without an interconnection between their international communications channels and AT&T's domestic network. If AT&T itself were also allowed to offer an international alternate voice-data service, the IRCs would be dependent upon a competitor for facilities essential to their own alternate voice-data offerings. Even if AT&T could be forced to interconnect with the IRCs in a manner which would permit customers to obtain access to the IRCs without undue

20. The FCC's authority to confine the IRCs to authorized "gateway" cities is contained in Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. §222.

inconvenience,²¹ AT&T would still possess innumerable subtle and unsubtle ways of abusing its domestic monopoly to compete unfairly with the IRCs' alternate voice-data service offering.²²

As indicative of the interconnection difficulties which could be anticipated if both AT&T and the IRCs were permitted to compete in the international alternate voice-data market, the IRCs pointed to a consistent pattern of past behavior on the part of AT&T (1) of resisting and denying adequate interconnection to the IRCs in connection with their Datel service, and (2) of resisting and denying interconnection in a variety of other markets in which AT&T faced competition from other companies dependent upon it for interconnection. Thus, ITT Worldcom and WUI referred the FCC to AT&T's long history of refusing to furnish WUI with the type of interconnection necessary to provide acceptable Datel service—a history characterized by a series of unilateral determinations by AT&T as to what was "required by the public interest at this time."²³

21. AT&T's behavior in an analogous situation, in which the so-called "specialized common carriers" needed interconnections with AT&T's network in order to compete with AT&T's domestic long-distance service, demonstrates the likelihood that AT&T will refuse to interconnect voluntarily with the IRCs, and will oppose interconnection until the FCC requires it to do so in an order which withstands judicial scrutiny. See *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 496 F.2d 214 (3rd Cir. 1974).

22. AT&T affiliates have, in the past, demonstrated their willingness to reduce or terminate the domestic services they provide the IRCs without regard for the impact their actions will have on the IRCs or their customers. See, *ITT World Communications Inc. v. New York Telephone Co.*, 381 F.Supp. 113 (S.D.N.Y. 1974), a case ITT Worldcom called to the FCC's attention. (A-437)

23. Commencing in 1965, ITT Worldcom and WUI sought to obtain a direct electrical interconnection between AT&T's domestic network and their international Datel circuits so as to eliminate the necessity of manual interception of Datel calls and relay of an incoming perforated tape to an outgoing overseas circuit (A-95-96, A-410). AT&T acceded to these requests only in August, 1972, little over a month following the FCC's Notice of Inquiry in this case (A-410). However, the "direct electrical interconnection" offered by AT&T

(A-95, A-410) In addition, WUI pointed out to the Commission, without dispute from AT&T, that local telephone companies owned by AT&T had consistently denied WUI interconnection of the sort it required, under circumstances which could only permit the inference that the local telephone companies were serving the interests of the parent company rather than their own. (A-411-12)

With respect to communication services other than Datel, the IRCs reminded the FCC of the Commission's consistent concern that AT&T has abused its monopoly position by refusing interconnection and other essential services to competing carriers. Thus, in the Commission's decision with respect to the telephone companies' role in the cable television industry, the FCC found:

"We are of the opinion that the preservation of . . . competition will best be assured by the exclusion of telephone companies in their service areas from engaging in the sale of CATV service to the viewing public, except where no practical alternative exists to make such service available within a particular community." *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307, 325 (1970), *aff'd. sub nom. General Telephone Co. of the Southwest v. U.S.*, 449 F.2d 846 (5th Cir. 1971).

In so holding, the FCC explicitly required the telephone companies to offer attachment or conduit rates to its facilities "on a non-discriminatory basis where space for such facilities can reasonably be made available without impediment to the telephone companies' obligation to supply non-CATV interconnection services to the public." 21 F.C.C.2d at 327.

to the IRCs at that time consisted of no more than a simple two-wire interconnection rather than a four-wire interconnection which is compatible with existing international trunk lines, and which is therefore necessary to permit the IRCs to render acceptable Datel service to the public. (A-411)

Similarly, in its decision with regard to the provision of interconnection facilities to land mobile radio carriers, the FCC ordered AT&T to refrain from discrimination in the provision of interconnection. *Amendment of Part 21 of the Commission's Rules*, 12 F.C.C.2d 841 (1968).²⁴ In the *Carterfone* decision, 13 F.C.C.2d 420 (1968), the Commission curtailed AT&T's historical policy of using tariff restrictions to prevent the interconnection of devices manufactured by other companies with its domestic network. Again, in *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), the FCC opened the domestic data communications field to specialized common carriers over AT&T's strong objections to interconnection.

Further, the IRCs argued that an authorization of AT&T to provide alternate voice-data service would provide AT&T with an opportunity to cross-subsidize its international voice-data service from the revenues of other operations in which it enjoys a monopoly, thereby competing unfairly both with the IRCs' alternate voice-data offerings and with the other communications services they offered. (A-86, A-92) The possibility of cross-subsidization is present, the IRCs noted, whenever a monopoly (particularly one with the financial resources of AT&T) is permitted to enter a related, competitive market.²⁵

The danger of cross-subsidization is especially acute where, as here, AT&T proposes to use a single, common set of facilities—its international voice circuits—to deliver two different forms of service, and to charge customers for its Dataphone service the same rate as customers who use

24. In the same decision it required separate accounting and payrolls to assist the FCC in monitoring efforts at cross-subsidization. 12 F.C.C.2d at 849-50.

25. The possibility of cross-subsidization was alluded to in the TAT-4 opinion in the FCC's reference to the possibility of the use of AT&T's "large sales force" supported by the company's total revenues to be concentrated on the sale of the new service. 37 F.C.C. at 1158.

their telephone strictly for voice communications. As noted above, the sensitivity of data transmissions to noise and other interference makes existing overseas voice circuits, which are perfectly satisfactory for voice conversation, less satisfactory for data transmission. In order to compete more effectively with the IRCs' more reliable record services, AT&T will have a significant incentive to upgrade its international circuits. Determining what portion of the cost of upgrading should be paid by the voice customer (who may enjoy some minor benefits), and what portion should be borne by the customer for data communications, for whom such improvements are a virtual necessity, will involve issues difficult, if not impossible, to resolve. If AT&T were to use the improved circuits for both voice and Dataphone and continue to charge each category of customer the same rate, the voice customer would pay most of the cost, even though the existing circuits are completely adequate for the spoken word, thus effectively cross-subsidizing the alternate voice-data service he does not use.

In addition to these antitrust considerations, the IRCs, and in particular RCA Globecom, pointed out that if AT&T were kept out of the market, the IRCs could offer an alternate voice-data service which would be technologically superior to the Dataphone service AT&T proposed, without any additional cost to the public. Thus, after noting that international telephone trunks were never designed to meet data transmission requirements, RCA Globecom went on to state (without dispute by AT&T) that it would provide superior transmission capability, primarily by using computer switching equipment designed to monitor and control the data channel and improve the quality of transmission (A-209-212). RCA Globecom thus offered a computerized system capable of selecting the most appropriate circuit for transmitting data overseas, in view of the special requirements of record technology, in place of AT&T's

random selection of overseas voice circuits by a telephone switching system designed to meet the less demanding technological requirements of voice communications. (A-218) In addition, RCA Globcom noted that its system would allow it to offer numerous additional options, which the customer might or might not choose to add. (A-212-15)²⁶

The initial comments AT&T filed with the FCC (A-143-168) merely described AT&T's domestic Dataphone service and attempted to demonstrate a demand for a similar international service, a point not at issue in this proceeding.²⁷ AT&T's efforts to deal with the IRCs' arguments in its reply comments (A-316-329) were unconvincing. Its sole attempt to distinguish TAT-4 was to quote a phrase from another FCC decision in which the Commission had stated "normally we have not licensed AT&T to provide overseas record services."²⁸ Seizing on the Commission's use of the word "normally", AT&T inferred that there might be exceptions to the FCC's general policy of excluding it from the international record communications industry, and urged that such an exception be made to permit it to offer international Dataphone service. However, AT&T offered no factual distinction or policy reasons why the TAT-4 rationale should not apply with full force to its proposal to provide international Dataphone service, as the IRCs had urged.

26. As noted hereinafter and in the Brief of Petitioner RCA Globcom, the FCC made a basic error in its decision in confusing RCA Globcom's proposal to offer additional options at additional cost to the customer with its offer of a basic service which constituted an improvement on AT&T's offering at the same cost as AT&T was proposing. See *infra* at p. 23.

27. Similarly, the brief comments of Xerox Corporation (A-28-53) and American Petroleum Institute (A-66-71), both intervenors herein, were primarily concerned with demonstrating a demand for international alternate voice-data services, a question the IRCs are not contesting in this Court. Neither of these parties filed reply comments with the Commission.

28. *ITT World Communications Inc.*, 2 F.C.C.2d 573, 576 (1966), quoted at A-319.

Turning to the more general antitrust considerations the IRCs raised, AT&T made no attempt to deny its established record of abusing its domestic monopoly, which the IRCs had brought to the FCC's attention. However, it nevertheless urged that it be permitted to compete with the IRCs to offer alternate voice-data service, apparently on the erroneous theory that the competitive vigor of an industry can be measured simply by counting the number of competitors, without any analysis of the special dangers created by permitting a monopolist to enter the market. (A-326) Finally, with respect to the IRCs' allegations that they could offer the public a superior alternate voice-data service at comparable rates, AT&T admitted that its Dataphone system had technological limitations but urged that it nonetheless served a public need.²⁹

The Report and Order. On January 19, 1976, three and a half years after the initial Notice of Inquiry, the FCC released the nine page Order which is the subject of this review proceeding. In the Order, the FCC characterized its inquiry as one to determine the specific issue of "whether the public interest would be best served by authorizing customers to use their telephone for dataphone or similar services overseas and, if so, what carrier or carriers should be permitted to offer this service." (A-2)³⁰ From an informal proceeding designed to determine agency policy,

29. A-323-325. Intervenor Hawaiian Telephone Company filed comments (A-136-140) and reply comments (A-359-366) which were essentially similar to those of AT&T. Hawaiian, which has a monopoly over telephone service in the Hawaiian Islands equivalent to AT&T's monopoly within the continental United States, argued that it, rather than the IRCs, should be authorized to provide alternate voice data service between Hawaii and international points. *Ibid.*

30. In its ordering paragraphs, the Order specifically directed the Chief of the Common Carrier Bureau to accept for filing applications from AT&T and the IRCs "in accordance with this Report and Order." (A-9)

the proceeding was converted into an adjudicatory one which substantially affected the carriers' interests by determining the nature of particular alternative voice-data services to be authorized and the identity of the carriers to provide each type of service.

With regard to the TAT-4 decision, the Order stated:

"This decision should in no way be construed as reversing this policy nor should it be interpreted so as to authorize AT&T to offer any other new services now or in the future." (A-6)

Rather, the FCC stated that the TAT-4 decision was distinguishable on two grounds: (1) that the alternate voice-data service involved in the present case would involve additional investment on the part of the IRCs but none on AT&T's part, whereas, in the case of the alternate voice-data service involved in TAT-4, the level of investment by AT&T and the IRCs would have been equal; and (2) that in the present case AT&T and the IRCs were proposing different services meeting different subscriber needs whereas in TAT-4, AT&T and the IRCs had proposed to offer identical services.³¹ (A-6)

With respect to the antitrust considerations urged by the IRCs as necessitating, independently of the TAT-4 decision, a policy excluding AT&T from the international alternate voice-data market, the FCC found that the IRCs had not met their burden of demonstrating a substantial adverse effect upon their existing services as a result of AT&T's entry into the market. Thus, the FCC found:

"Despite the opportunity granted to them by this inquiry, the IRCs have not justified their allegation that they would suffer a significant decline in Telex

31. While the FCC characterized the offering by the IRCs in this case as being "different . . . meeting different subscriber needs" for purposes of distinguishing the instant case from TAT-4 (A-6), elsewhere in its decision the FCC acknowledged that the IRCs proposed to offer a so-called "basic dataphone service" essentially identical with the service offered by AT&T. (A-5)

and AVD service such as to have a substantial adverse effect upon the provision of their services to the public." (A-7)

While acknowledging some merit in the complaints concerning difficulties in obtaining interconnection with AT&T, the FCC postponed consideration of these problems to a later date. (A-8-9) It also assumed, without demonstration, an ability on its part to ensure that the service offered by AT&T would fulfill "a public need at cost-justified rates," (A-8) i.e., without cross-subsidization. It added that "if substantial modifications are to be made to the capabilities of this basic overseas telephone system" so as to "enable AT&T to offer specialized dataphone services," additional authorization would be required under Section 214 prior to the installation or operation of such facilities. (A-7)

Finally, with respect to the IRCs' argument that they could provide better services at comparable costs to the customer, the FCC apparently assumed the accuracy of the argument but decided against the IRCs' application simply because it would entail additional investment by the IRCs' owners. (A-6)

POINT I

THE FCC ACTED ARBITRARILY AND CAPRICIOUSLY WHEN, IN ITS ORDER, IT DEPARTED WITHOUT ADEQUATE EXPLANATION FROM ITS PRECEDENTS EXCLUDING AT&T FROM ITS INTERNATIONAL ALTERNATE VOICE-DATA MARKET.

In its Order, the FCC made two attempts to reconcile its decision to permit AT&T to offer international alternate voice-data service with its earlier decision in TAT-4 that AT&T should be prohibited from offering such services. First, the FCC purported to distinguish the two cases on the ground that the TAT-4 decision involved an alternative voice-data service which could be furnished by AT&T or

the IRCs with equal investments by either, while the alternate voice-data service involved in the instant case would require a greater investment by the IRCs than by AT&T. Secondly, the Commission asserted that AT&T and the IRCs were not proposing to offer the same alternate voice-data services in the instant case, as they had in the TAT-4 proceeding. (A-6)

The first ground for distinction relied on by the FCC is not supported by the TAT-4 opinion and would, in any event, make this a more, rather than less, appropriate case in which to apply the rationale of TAT-4. The second ground for distinction is contradicted not only by the record in this case but also by the FCC itself in other parts of its Order. The attempt at reconciliation of the two decisions is thus wholly inadequate and the FCC's Order must therefore be reversed.

It is a basic application of the rule which requires an agency to avoid arbitrary and capricious decision-making that similar cases receive similar treatment from the agency. As was said in *F.T.C. v. Crowther*, 430 F.2d 510, 514 (D.C. Cir. 1970):

"The facts have that degree of parallelism which entitles both appellants and ourselves to a fuller explanation from the Commission, and not from its counsel in this court, as to why the [prior] approach should be jettisoned without giving credence to the charge that similar supplicants receive dissimilar dispensations."³²

What the courts have required is either (1) a reasoned change in the applicable decisional rule, *e.g.*, *Columbia*

32. *Accord, Secretary of Agriculture v. U.S.*, 347 U.S. 645, 653 (1954); *Larus & Brother Co., Inc. v. F.C.C.*, 447 F.2d 876, 879 (4th Cir. 1971); *Kodiak Airways, Inc. v. C.A.B.*, 447 F.2d 341, 354 (D.C. Cir. 1971); *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1971), *cert. den.*, 403 U.S. 923 (1971); *Marine Space Enclosures, Inc. v. F.M.C.*, 420 F.2d 577, 585 (D.C. Cir. 1969); *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730, 733 (D.C. Cir. 1965).

Broadcasting System, Inc. v. F.C.C., 454 F.2d 1018, 1026 (D.C. Cir. 1971), or (2) a rational explanation of the factual differences which make the decisional rule of the earlier case inapplicable. *E.g.*, *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730, 733 (D.C. Cir. 1965).

In this case, the FCC explicitly refused to abandon the decisional rule expressed in the TAT-4 case (A-6) and purported to base its result on factual distinctions which made that decisional rule inapplicable here. However, the two factual distinctions the FCC purported to draw between the two cases are not supported by the record below or the TAT-4 opinion. In any event, the asserted factual differences on which the FCC relies have no bearing on the considerations which the FCC found controlling in TAT-4, and therefore cannot be used to justify the inconsistency between the Order and that precedent.

The FCC's decision in TAT-4 to exclude AT&T from the international alternate voice-data market was based upon a factual determination that AT&T's "vast nationwide domestic network and its large sales force" gave it an insuperable competitive advantage over the IRCs, which were confined to doing business in a limited number of "gateway cities" and did not have sales forces which could compete effectively with the far larger resources of AT&T.³³

The FCC's "realistic appraisal" of the competitive positions of AT&T and the IRCs led it to conclude that if AT&T were allowed to offer international AVD service, the IRCs would be unable to obtain a "meaningful share of the business."³⁴ The Commission found that a "substantial portion" of AT&T's AVD traffic would be "diverted from [the IRCs'] existing overseas services" and that the revenue to the IRCs "would inevitably suffer" as a result

33. 3. F.C.C. at 1158.

34. 37 F.C.C. at 1159. The FCC bolstered this conclusion by observing that AT&T had succeeded in winning all the AVD business of the Department of Defense, the one customer it had theretofore been authorized to serve.

of this diversion of business to AT&T "could affect [the IRCs'] ability to continue to provide [their existing services] at anything approximating current rates."³⁵ The FCC therefore held that it was "in the public interest to assure the viability" of the IRCs by denying AT&T permission to provide international AVD services.³⁶

As the IRCs pointed out in the record below, none of these factors which provided the rationale for the TAT-4 decision had been altered in the interim between that decision and the instant proceedings. Nor did the FCC find that these factors which had influenced it in TAT-4 were no longer significant. Instead, the FCC based its decision upon two purported factual differences in the two cases, which it concluded called for a different result here.

However, the primary factual distinction which the FCC purported to find between this case and TAT-4—the fact that the IRCs will have to make additional investments to provide international alternate voice-data service while AT&T will not—is refuted by the TAT-4 opinion itself. In TAT-4, the Commission recognized that to provide international AVD service, the IRCs would have to obtain facilities to interconnect their international circuits with AT&T's domestic network—precisely the same sort of "additional investment" they will be called upon to make in order to provide the similar alternate voice-data service at issue here.³⁷ Moreover, even if this purported factual distinction could be established from the record, the FCC cannot meet its responsibility to explain its departure from TAT-4

35. 37 F.C.C. at 1159.

36. 37 F.C.C. at 1159. The FCC observed that losing AVD revenues would have an inconsequential effect on AT&T, since AT&T had huge domestic revenues and had never derived a significant fraction of its income from international record services. 37 F.C.C. at 1159. The FCC also noted that AT&T had repeatedly assured the IRCs that it had no interest in providing international data communications services. 37 F.C.C. at 1159.

37. TAT-4, *supra*, 37 F.C.C. at 1158, 1160.

merely by observing that such factual differences exist. The Commission must "do more than enumerate factual differences . . . it must explain the relevance of those differences to the purposes of the Federal Communications Act."³⁸ Far from eliminating the need for excluding AT&T from the alternate voice-data market, the purported disparity in the level of investment required by AT&T and the IRCs reinforces it. The competitive inequality between the IRCs and AT&T which provided the basis for the TAT-4 decision is increased rather than decreased in a situation where the IRCs cannot even enter the market without an investment not required by AT&T. AT&T will, if the FCC's assumption with regard to investments is correct, start out even farther ahead of the IRCs in the competitive race than it did with respect to the service involved in TAT-4.

The second distinction relied upon by the FCC—that the IRCs were not proposing to offer the same service as AT&T in the instant case but only a more specialized service—is without basis in the record and is in fact contradicted by the FCC's own Order. Thus, the FCC conceded in a portion of its Order prior to its discussion of TAT-4 that the IRCs could offer similar services to those of AT&T at comparable rates (A-5).

Even if the FCC's reference to the relative levels of investment required by AT&T and the IRCs is to be read as a statement of a reason for overruling TAT-4—which the FCC explicitly stated it was not—the IRCs were entitled to an explanation of the relation of that reason to the ultimate purposes of the Communications Act. As was stated in *Columbia Broadcasting System, Inc. v. F.C.C.*, *supra*, 454 F.2d at 1026:

"We do not challenge the Commission's well established right to modify or even overrule an established precedent or approach, for an administrative

³⁸ *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730, 733 (D.C. Cir. 1965).

agency concerned with the furtherance of the public interest is not bound to rigid adherence to its prior rulings. Lodged deep within the bureaucratic heart of administrative procedure, however, is the equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." (Footnotes omitted).

No such explanation has been given by the FCC and the only conceivable one which could be offered—that the different levels of investment by the monopoly on the one hand and by the competitive IRCs on the other will result in lower charges to the public—is contradicted by the FCC's own findings in this case. Thus, the FCC accepted without dispute the IRCs' assurances that the additional investments and operating expenditures which they would make in order to provide an international alternate voice-data service similar to AT&T's basic Dataphone service would not be so great as to require rates any higher than those proposed by AT&T. (A-5) Only the so-called specialized services would require further "additional investment and thus higher rates." (*Ibid.*) Nor could the FCC find that a more efficient use of AT&T's facilities will result in lower rates to all users of those facilities, since AT&T has not offered to reduce the rates charged customers who use AT&T's circuits exclusively for voice communications if it is also permitted to use these circuits for alternate voice-data communications.

Since the Commission has failed to reconcile its Order with its TAT-4 decision by explaining how the policy expressed in that case is furthered by its decision here, or by indicating an adequate reason for departing from the rationale of that precedent, the Order should be reversed and the case remanded for further consideration by the agency.

POINT II

THE FCC FAILED TO FOLLOW PROCEDURES REQUIRED BY LAW FOR THE RESOLUTION OF ISSUES CONCERNING THE ANTICOMPETITIVE EFFECTS OF ITS DECISION.

While it is now well accepted that the preservation of competition in a regulated industry is not to be equated *per se* with the furtherance of the public interest,³⁹ it is also basic law that the "fundamental national economic policy"⁴⁰ in favor of competition expressed in the antitrust laws is one element entitled to consideration in any public interest analysis of an agency's proposed course of action.

"A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 298 (1974).⁴¹

39. See, generally, *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Hawaiian Telephone Co. v. F.C.C.*, 498 F.2d 771 (D.C. Cir. 1974).

40. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966).

41. To the same effect, see e.g., *Gulf States Utility Co. v. F.P.C.*, 411 U.S. 747, 759 (1973); *F.M.C. v. Svenska Amerika Linien*, 390 U.S. 238 (1968); *Denver & R.G.W.R. Co. v. U.S.*, 387 U.S. 485 (1967); *U.S. v. Radio Corporation of America*, 358 U.S. 334 (1959); *F.C.C. v. RCA Communication, Inc.*, 346 U.S. 86, 94 (1953); *McLean Trucking Co. v. U.S.*, 321 U.S. 67, 79-80 (1944); *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 218 (1943).

A. The FCC Failed To Give Adequate Reasons For Choosing Monopoly Over Competition As The Means For Providing The Public With Alternate Voice-Data Service.

In its Order, the FCC decided, without considering or articulating any basis for its choice, that it preferred a monopolistic market structure, which would result if AT&T were authorized to offer basic alternate voice-data services, over a competitive market in which the IRCs offered the same service in competition with one another. Thus, the FCC never addressed the IRCs' assertions that in competition with each other they could provide an international alternate voice-data service at least as good, if not superior to, AT&T's service, and at comparable prices. Indeed, the FCC assumed without dispute that the IRCs' "rates for such service will be comparable to those of AT&T for similar service." (A-5) Instead, the FCC taxed the IRCs with being "unable to *undercut* AT&T's rates for basic data-phone-type services." (A-5, emphasis supplied). That observation indicates a preference for a monopolistic market structure over one in which competition exists, given equality of rates—a preference nowhere explained in the Commission's Order.

In its opinion, the FCC addressed the issue of competition in only one aspect, namely, the IRCs' allegations that AT&T would use its basic alternate voice-data service to compete unfairly with the IRCs' existing telex and AVD services.⁴² The FCC treated these allegations as raising an issue familiar to it from *Carroll Broadcasting Co. v. F.C.C.*, 258 F2d 440 (D.C. Cir. 1958), namely, an issue as

42. In confining its consideration of the competitive implications of its Order to a discussion of the Order's impact on the IRCs' existing services, the FCC totally ignored the primary antitrust issue before it, namely, how its Order would affect competition among the carriers to offer the new alternate voice-data services with which the Order was most directly concerned.

to the degree of protection which the public interest standard of the Communications Act provides one licensee against competition by another. The FCC resolved this issue by a superficial burden of proof analysis and a statement that it would not erect a "protective umbrella" for the IRCs if they could not compete with AT&T. (A-8)⁴³ What the FCC failed entirely to consider in its Order were the IRCs' allegations that the choice of AT&T to provide alternate voice-data service was a choice, not between competitors as in *Carroll*, but a choice of monopoly over competition. However the FCC chose to resolve this issue—and under the case law it could concededly resolve it in favor of monopoly if it found the public interest to be thereby served—it was obliged to articulate the public interest considerations leading to its decision. AT&T offered none—it proposed neither lower rates for basic alternate voice-data services than the IRCs nor rate reductions for AT&T's other services as the result of a more efficient use of its facilities (see p. 24, *supra*)—and none were articulated by the Commission which inexplicably chose the monopolist because the IRCs could not "undercut" its rates. (A-5). Under the circumstances the Order must be reversed. *Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, *supra*; *Gulf States Utility Co. v. F.P.C.*, *supra*; and see, *Marine Space Enclosures, Inc. v. F.M.C.*, 420 F.2d 577 (D.C. Cir. 1969).

Moreover, not only did the FCC fail to articulate any public interest considerations supporting its decision, it

43. As discussed *infra* at pp. 33-38, even in its burden of proof analysis of what it took to be the *Carroll* issue, the FCC erred, since its *Carroll* analysis treated AT&T as simply one competitor among many rather than as the monopolist it concededly is; since its burden of proof analysis avoided its obligations as a regulatory agency to investigate allegations of competitive restraints *sua sponte* in the public interest; and since even under *Carroll*, it placed a burden of proof on the IRCs heavier than that permitted under the applicable case law.

failed as well to answer the IRCs' allegations that a decision allowing AT&T to provide basic alternate voice-data service would be contrary to the public interest because it would present AT&T with opportunities to expand its practice of charging the public unreasonably excessive rates for its monopoly services in order to cross-subsidize competitive services, and with incentives to withhold the interconnections required by the IRCs to supply their own concededly necessary services to the public, thereby permitting AT&T to expand its monopoly to the markets served by the IRCs.

1. *The FCC's failure to address the cross-subsidization issue.*

No where in its Order does the FCC expressly discuss the possibility that AT&T will use its large financial resources to subsidize unfair competition between its international Dataphone services and the IRCs' existing services or their proposed alternate voice-data offerings. The closest the FCC comes to addressing the issue is the following comment:

"If the IRCs cannot effectively compete with dataphone-type uses of MTS, consistent with this Order, and if the service thereby fulfills a public need *at cost-justified rates* below those which the IRCs can justify for their own service, we shall not impose a protective umbrella to assure the IRCs a portion of the market." (A-8; emphasis added)

It is unclear from the foregoing statement whether the FCC simply begged the question by assuming that AT&T's Dataphone rates would be cost-justified, rather than cross-subsidized, or whether the FCC intends to investigate the cost justification for AT&T's tariffs at some unspecified future time. What is apparent in either event is that the FCC never considered the option of avoiding the danger of

cross-subsidization by adhering to its TAT-4 decision and excluding AT&T from the market, and that it failed entirely to consider the impracticality of attempting to prevent AT&T from engaging in the practice, as established by its past inability to regulate AT&T's monopoly.

What reasoned consideration of the cross-subsidization argument would have required, at a minimum, was an answer to the criticism of the agency's regulation of AT&T which the District of Columbia Circuit recently made in *Nader v. F.C.C.*, 520 F.2d 182 (D.C. Cir. 1975).⁴⁴ In that decision, the court sharply criticized the FCC, *sua sponte*, for the inadequacy of its attempt to prevent AT&T from cross-subsidizing communications services which faced competition with revenues it earned from other services where it enjoyed a monopoly.

As the *Nader* opinion indicates, the FCC commenced an inquiry into AT&T's cross-subsidization practices over ten years ago, when AT&T was ordered to submit a cost and revenue study of seven different categories of telephone services.⁴⁵ The results of that study—

“... disclosed wide variations in earnings among the various services. At one extreme, message toll telephone and WATS [i.e., AT&T's monopoly services] were earning at the rates of 10 and 10.2 percent, respectively, while Telpak [a competitive service], at the other extreme, was earning at the rate of .3

44. The FCC was also obliged to consider the alternatives the IRCs proposed to limit cross-subsidization, discussed *infra* at pp. 39-40.

45. *American Telephone & Telegraph Co.* (Docket 16258), 2 F.C.C. 2d 871 (1965). The FCC ordered the seven way cost study as part of its Domestic Telegraph Investigation (Docket No. 14650). 2 F.C.C. 2d at 871. The telegraph investigation was begun as a result of the impact on Western Union of certain selective price reductions AT&T had made in the services it offered in competition with that carrier. Western Union alleged that these price reductions were cross-subsidized. See Trebing, “Common Carrier Regulation—The Silent Crisis,” 34 *Law and Contemporary Problems*, 299, 309 (Spring, 1969).

percent, all on the basis of the data as reported by [AT&T] and without any adjustment by the Commission." 2 F.C.C. 2d at 871.

As the Commission noted:

"The importance of such a determination is underscored by the fact that certain of the services involved are furnished by the Bell System in direct competition with services offered by other carriers. To the extent that these services may be underpriced by the Bell System, this may have a competitive impact on such other carriers." 2 F.C.C. 2d at 872

The Commission, therefore, directed a further investigation of the reasonableness of AT&T's prices and pricing structure.⁴⁶ However, the Commission pursued its investigation in a desultory, lackadaisical fashion "without a decision in sight"⁴⁷ at the time *Nader* was decided. The *Nader* court therefore felt compelled to observe:

"We are sympathetic with [petitioner's] characterization of [the cross-subsidization investigation] as 'an interminable proceeding, the principal function

46. 2 F.C.C. 2d 873-874. The FCC included a number of other issues in the investigation, including the question of whether the prices AT&T's telephone companies paid to their affiliated equipment supplier, Western Electric, were unreasonably high.

The FCC subsequently abandoned the parallel investigation of Western Electric prices, stating:

"[W]e do not have sufficient resources to permit adequate staffing of the hearings that would be involved or to complete the preparatory staff work required for developing a meaningful evidentiary record on these issues. This is the result of the continuing growth in the volume and complexity of regulatory problems within the common carrier field." *American Telephone and Telegraph Co.*, 32 F.C.C. 2d 691, 692 (1971), See also 32 F.C.C. 2d at 701.

The Commission later reconsidered and reactivated the Western Electric investigation, but that investigation, like the cross-subsidization investigation, was far from complete when *Nader* was decided. See 520 F.2d 205-206.

47. *Nader*, *supra*, 520 F.2d at 206.

of which has been that of a giant regulatory wastebasket.' Though unwilling to impute ill motives to the Commission, we are constrained to agree with [petitioner] on the following point:

● nine years should be enough time for any agency to decide almost any issue. There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all—and the result is a denial of justice.

"Under the Administrative Procedure Act, administrative agencies have a duty to decide issues presented to them within a reasonable time, and reviewing courts have a duty to 'compel agency actions unlawfully withheld or unreasonably delayed.' Although the issues are complicated, we can find no justification for a delay of ten years. We agree with then Commissioner Johnson's assessment:

"It is nothing short of amazing that this agency has been able to conduct two major AT&T rate of return proceedings while being unable to finish either the ten-year-old proceeding to decide whether the average citizen is paying too much for interstate service while special users get a rate subsidy, or the proceeding begun in 1965 to determine the appropriateness of Bell's costs. . . ." 520 F.2d at 206 (citations omitted)

Thus, despite a ten-year-old investigation, prompted by a study of AT&T's earnings which produced strong evidence of cross-subsidization, the FCC has been unable to reach a final determination as to whether AT&T's rates are cost-justified.⁴⁸ Under such circumstances, the IRCs have

48. A recent FCC decision, *American Telephone & Telegraph Co.*, 55 F.C.C. 2d 224, 234 ¶27 (1975), establishes that the FCC has still reached no conclusion as to proper roles of long-range incremental cost studies and fully distributed cost studies, or the relative merits of either, in analyzing AT&T's rate structure. This decision demonstrates that the FCC still does not know what a cost-justified rate is, much less whether AT&T's rates are in fact cost-justified.

good reason to be concerned that AT&T will use its monopoly revenues to finance unfair competition with their own international services. Given the FCC's record of failure in its attempt to regulate AT&T's anticompetitive pricing practices, the IRC's cross-subsidization arguments clearly required more of a response than the Order's inarticulate, unexplained assumption that cross-subsidization would not occur.

2. The FCC's failure to address the interconnection issue.

The FCC's Order recognizes the necessity of interconnection to the IRCs if they are to compete effectively with AT&T's Dataphone service (A-8), and acknowledges that the IRCs have had "some difficulty" in obtaining interconnection from AT&T (*id.*). However, the FCC deferred consideration of the issue until the IRCs had filed further petitions for interconnection, stating that it would issue "any appropriate orders" only "upon reviewing these [additional] filings." (A-8).

What this deferral of consideration ignored was another chapter in AT&T's long history of misusing its domestic monopoly, this time by denying its competitors essential interconnections through years of litigation and delay;⁴⁹ the opportunity to avoid such difficulties by adhering to the TAT-4 decision; and the immediacy of the IRCs' need for a resolution of the interconnection issue before, rather than after, AT&T was itself allowed to enter the market.

49. The interconnection disputes in which AT&T has been involved in the past and which the IRCs called to the FCC's attention all involved situations in which AT&T was seeking to prevent a competitor from offering a new service which AT&T was not itself offering to the public at that time. *CATV* decision, 21 F.C.C. 2d 327 (1970); *Carterfone*, 13 F.C.C.2d 420 (1968); *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969). In such situation, AT&T's delaying tactics effectively postponed the date on which the public had the new service available to it. Those tactics did not, as here, permit AT&T to garner the market for its own system while it delayed the competitors' entry.

The urgency of immediate consideration of the interconnection problem results from the fact that AT&T is presently in a position to offer its international alternate voice-data service while the IRCs cannot begin to place comparable systems into operation until their interconnection disputes with AT&T are resolved. Thus, AT&T is in a position to gain significant competitive advances in winning the market for its own system while delaying the introduction of its competitors' systems until litigation forces it to provide the IRCs the interconnections to which they are entitled.⁵⁰ Under such circumstances, deferral of consideration of interconnection disputes to a later date will have the kind of immediate impact which requires the FCC to consider interconnection before, rather than after, authorizing AT&T to enter the market. *Cf. National Ass'n. of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976), *pet. for cert. filed sub nom. National Ass'n. of Radiotelephone Systems v. F.C.C.*, 44 U.S.L.W. 3495 (Dkt. No. 75-1216, filed February 25, 1976).

B. The FCC Improperly Decided The Issue Of How The IRCs' Existing Services Would Be Injured By AT&T's Entry Into The Market On The Basis Of A Burden Of Proof Analysis.

As noted above, *supra* p. 26, the FCC disposed of the IRCs' complaints that the admission of AT&T to the international alternate voice-data market would adversely affect their existing telex and AVD services on the basis of a burden of proof analysis drawn from *Carroll Broadcasting Co. v. F.C.C.*, 258 F.2d 440 (D.C. Cir. 1958). Thus, the FCC stated in its Order that:

"Despite the opportunity granted to them by this inquiry, the IRCs have not justified their allegation that they would suffer a significant decline in Telex

50. *Cf. Bell Telephone Co. of Pennsylvania v. F.C.C.*, 503 F.2d 1250, 1254-59 (3rd Cir. 1974), *cert. den.*, 422 U.S. 1026 (1975), which describes MCI Corporation's six year legal battle to obtain interconnection from AT&T.

and AVD service such as to have a substantial adverse effect upon the provision of their services to the public." (A-7)⁵¹

However, the IRCs did not present the FCC with the kind of choice between two equal competitors at issue in *Carroll*, where the question was whether the market could support two competitors.⁵² Instead, they pointed out the obvious—that the choice was between monopoly and competition. (A-269-70, A-85-86, A-197-199, A-295, A-333, A-373) In resolving such a choice, burdens of proof have no place.

In *Marine Space Enclosure, Inc. v. F.M.C.*, 420 F.2d 577, 585-86 (D.C. Cir. 1969), the court dealt with an argument that the parties to an administrative proceeding, so far from meeting an alleged burden of proof with regard to antitrust considerations of this sort, had barely alerted the agency to their existence. The court stated:

"Antitrust questions . . . present issues of the kind that should be explored *sua sponte* in order to dis-

51. "Telex" refers to the IRCs' teletypewriter exchange service by means of which their customers communicate via teletypewriters and teleprinters through exchange systems provided by the IRCs. "AVD" refers to one of the IRCs' existing alternate voice-data services. As discussed *supra* at p. 26, the FCC took no note of the IRCs' complaint concerning the impact of admitting AT&T into the alternate voice-data market on the provision by the IRCs of an alternate voice-data service of the type proposed by AT&T. As the IRCs noted, they could not hope to offer such service competitively with AT&T if AT&T was permitted to enter the market. (A-85-86, A-197-199, A-267, A-269-70).

52. Even had this been a *Carroll* type case, the FCC could not have required—as it implicitly did in this case—that the IRCs demonstrate in advance when and where they would suffer the loss of existing telex and AVD revenues, and how much the loss would be. *Folkways Broadcasting Co., Inc. v. F.C.C.*, 375 F.2d 299, 303 (D.C. Cir. 1967):

"[A] *Carroll* hearing may not be limited to a case in which pre-knowledge of the exact economics of the situation is necessarily available. Requiring such precision would eliminate the doctrine as a practical matter."

And see, *WLVA, Incorporated (WLVA-TV), Lynchburg, Va. v. F.C.C.*, 459 F.2d 1286, 1296 (D.C. Cir. 1972).

charge an agency's 'active and independent duty to guard the public interest,' and if need be, the Commission should order a hearing to ascertain whether there exist 'alternative courses, other than those suggested by the applicant.' This is responsive to the dominant consideration that anticompetitive restraints, the kind that would be illegal or of doubtful legality if used in unregulated industry, are in some ways contrary to the public interest that shapes rules governing the persons in directly regulated industry.

"The importance of adherence to the 'fundamental policies' of the antitrust laws is undeniable. We need not consider whether or to what extent they may in some cases permit relaxation of customary requirements of the adversarial process in order to ensure the surveillance contemplated by law. Certainly consideration of antitrust issues is required in this case, where they were timely raised by petitioner's protest, albeit in general terms. The Commission cannot fairly say it was in no wise alerted to the magnitude of the problems—for when the issue fairly clamors for attention, even a gentle reminder speaks loud enough for the agency conscientiously discharging its duty." (footnotes omitted)⁵³

However, antitrust issues are only a particularly pressing instance of the kind of public interest considerations with respect to which the FCC has a duty to represent the public interest affirmatively, wholly apart from the success the parties to the proceeding may have in establishing their

53. See, also, *Martin-Trigona v. F.R.B.*, 509 F.2d 363, 367 (D.C. Cir. 1975) ("[A]ntitrust policy is of such national importance that regulatory agencies should apply that policy *sua sponte* in order to discharge their duty to represent the public interest.") *National Ass'n. of Indep. Tel. Producers & Distrib. v. F.C.C.*, 502 F.2d 249, 257-58 (2d Cir. 1974); *City of Lafayette v. S.E.C.*, 454 F.2d 941, 948 (D.C. Cir. 1971), *aff'd. sub nom., Gulf States Utility Co. v. F.P.C.*, 411 U.S. 747 (1973) ("[T]he agency has the authority and typically the responsibility to consider a challenge based on the asserted anti-competitive purpose or consequence of the proposal.").

case.⁵⁴ As this Court observed in *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. den.*, 383 U.S. 911 (1966):

"In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

"This Court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties. . . . The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts."⁵⁵

This now generally acknowledged rule of agency law was applied with particular force to the FCC itself in an opinion by Judge (now Chief Justice) Burger in *Office of Communications of United Church of Christ v. F.C.C.*, 425 F.2d 543 (D.C. Cir. 1969). In that case, the Court of Appeals reversed the Commission because it had shirked its "affirmative duty to assist in the development of a meaningful record" when it disposed of public interest issues raised by a group of intervenors on the ground that the intervenors had failed to justify their factual allegations despite

54. Given the difficulties which the FCC itself has had in investigating AT&T's anticompetitive activities, as indicated in *Nader v. F.C.C.*, 520 F.2d 182 (D.C. Cir. 1975), discussed *supra* at pp.29-32, it is ironic that the Commission should decide antitrust issues involving AT&T on the basis of a private party's inability to "prove" the anti-competitive impact of AT&T's practices in a notice and comment proceeding.

55. Followed in *National Association of Indep. Tel. Producers & Distrib. v. F.C.C.*, 502 F.2d 249, 257-58 (2d Cir. 1974); *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971).

the "ample and sufficient opportunity" they had been given to do so. Finding that the FCC had improperly analogized the intervenors to plaintiffs in a civil action when it allocated the burden of proof to them, Judge Burger observed that the appropriate analogy was

"—more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred." 425 F.2d at 546.

In all events, a burden of proof analysis is never appropriately employed, and indeed violates due process when used as a basis for deciding issues in a policy-making proceeding based upon notice and comment. In response to the FCC's Notice of Inquiry, which simply sought their comments on a number of issues specified by the FCC, the IRCs discussed at length the antitrust dangers inherent in AT&T's proposal to enter the international alternate voice-data market. In the context of a notice and comment proceeding, with no opportunity to develop an evidentiary record through discovery, oral testimony and cross-examination, it was impossible for the IRCs to have done any more. Moreover, in requiring the IRCs to prove the adverse impact AT&T's Dataphone service would have on their existing operations, the FCC was expecting the IRCs to demonstrate an effect which the FCC in TAT-4 had presumed would necessarily follow from AT&T's introduction of international alternate voice-data service. Thus, in TAT-4, the FCC flatly stated:

"It is in the public interest that we assure the viability of the record carriers by protecting them from the losses they would *inevitably* suffer were AT&T permitted to provide this voice-record service." 38 F.C.C. at 1159 (emphasis added).

For the FCC now to demand, without notice or warning, that the IRCs prove an effect which the FCC itself had previously deemed inevitable is obviously unfair to the IRCs and a violation of their rights to due process of law.

Finally, the FCC's use of a notice and comment procedure to decide whether AT&T's Dataphone service would seriously injure the competitive posture of the IRCs' existing services is inconsistent with the principle that such complicated antitrust questions should be decided in an adjudicatory proceeding. As was said in *Marine Space Enclosures, Inc. v. F.M.C.*, *supra*, 420 F.2d at 589:

"Ordinarily, . . . antitrust issues do not lend themselves to disposition solely on briefs and argument. Even though there may be no disputed 'adjudicatory' facts, the application of the law to the underlying facts involves the kind of judgment that benefits from ventilation at a formal hearing." (Footnote omitted)

And see, *Citizens for Allegan County, Inc. v. F.P.C.*, 414 F.2d 1125, 1128-29 (D.C. Cir. 1969):

"[S]ummary procedures are held to have only limited scope in antitrust litigation."⁵⁶

56. The FCC's disposition of the antitrust issues the IRCs raised on the basis of nothing more than the parties' written comments is directly analogous to the entry of summary judgment in a civil antitrust case. The FCC's actions are thus inconsistent with the policy of the Supreme Court that summary judgments are disfavored in antitrust litigation:

"We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (Footnote omitted).

C. The FCC Improperly Failed To Consider Alternative Methods Of Providing International Alternate Voice-data Service Which Are Less Restrictive Of Competition.

A corollary of the rule that an administrative agency may not decide public interest issues solely by allocating the burden of proof is the rule that the agency must go beyond the precise proposal which initiates its inquiry and consider whether the public interest might not be better served by alternative methods accomplishing the same end. *Marine Space Enclosure, Inc. v. F.M.C.*, *supra*, 420 F.2d at 585; *City of Huntingburg v. F.P.C.*, 498 F.2d 778, 788 (D.C. Cir. 1974); *Citizens for Allegan County, Inc. v. F.P.C.*, 414 F.2d 1125, 1133 (D.C. Cir. 1969).⁵⁷

Here, the case presented by the IRCs, which the FCC in its Order assumed to be true and which AT&T did not dispute, was that they could offer the public an international alternate voice-data service similar to AT&T's, at comparable rates but without the anticompetitive consequences of admitting AT&T into the market. Given this clearly presented alternative, the proper questions for consideration by the FCC were whether any benefits to the public would result from AT&T's service which could not be matched by the IRCs and, if so, whether those benefits were significant enough to outweigh the public interest in protecting competition in the market for international record

57. See, generally *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 165, 168 (1962) (citations omitted; emphasis supplied):

"The difficulty with the order arises in connection with the findings and conclusions relevant to the choice of remedy. The assumption of the Commission was that the deficiencies of service made either of two remedies available. . .

* * *

The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public.*"

services from the threat created by admitting AT&T into that market. However, as noted above, the FCC never addressed the IRCs' assertions that they could provide an international alternate voice-data service at least as good if not superior to AT&T's, at comparable prices.

Even had the FCC properly determined that adequate alternate voice-data service could be offered internationally only if AT&T alone or both AT&T and the IRCs were authorized to offer the service to the public, the FCC failed to consider other alternatives proposed by the IRCs which would have limited the potential anticompetitive effects of such a market structure. Thus, the FCC failed to consider the IRCs' proposal that it follow its own precedents and require corporate and operational separation of AT&T's international alternate voice-data service from its domestic operations, which would, at a minimum, facilitate the monitoring of the most obvious opportunities for cross-subsidization (A-438).⁵⁸ Further, the FCC declined to follow its own precedents requiring segregation of account books and payrolls in order to permit the FCC to later determine whether AT&T's international alternate voice-data service had been cross-subsidized by revenues obtained from other services. *Land Mobile Service*, 51 F.C.C.2d 945, 951 (1975), *aff'd.*, *sub nom. National Ass'n. of Regulatory Commissioners v. F.C.C.*, *supra*. Under such circumstances, the FCC's Order should be reversed to permit the FCC to give adequate consideration to the alternative pro-competitive courses available to it.

58. Examples of earlier FCC orders requiring such segregation of international and other activities, cited to the Commission by ITT Worldcom (A-438), included the corporate and operational separation of Comsat's international and other activities in *Domestic Communications-Satellite Facilities*, 35 F.C.C.2d 844, 851-853 (1972), *mfd.*, 37 F.C.C.2d 184 (1972), *mfd.*, 38 F.C.C.2d 665 (1972), and the corporate and operational separation of RCA Globcom's international and domestic activities. *RCA Global Communications, Inc.*, 56 F.C.C.2d 660 (1975).

POINT III

THE FCC ERRED IN TREATING AS A MATTER OF AGENCY POLICY A DIRECTIVE DETERMINING SUBSTANTIVE RIGHTS BETWEEN THE PARTIES

The Commission characterized its proceeding in its initial Notice of Inquiry as an "inquiry into policy" (A-1). By proceeding in this manner the FCC implicitly limited its inquiry to the development of what might properly, under the case law, be denominated as a statement of policy, namely, a directive to its own employees which identified the considerations they were to take into account in their administration of the Communications Act in future cases, but which would have no substantive impact on the parties until those future cases came on for adjudication. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972); *Pickus v. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).

In much of its Order the FCC expressed itself in a manner quite consistent with the formulation of policy for future cases, making a series of assumptions (expressed in terms of expectations, anticipation and appearances)⁵⁹ as to what the various parties would do.⁶⁰

However, the FCC moved from this hypothetical statement of facts to a directive, in its ordering paragraph, which, far from merely specifying the issues to be considered by Commission employees when and if the Order's

59. Thus, the Order refers to "the services which *we anticipate* being offered by the IRCs" (A-5) and states that "*we anticipate* that AT&T and the IRCs will offer different types of services." (A-7). Again, the FCC states "*we expect*, instead, that the different services which will be rendered will meet different public needs." (A-7). In addition the Order states "the IRCs *would appear* to be unable to undercut AT&T's rates for basic dataphone-type services" (A-5). The FCC notes "the more specialized IRC services *would apparently* be priced higher than AT&T's offering" (A-4).

60. The Order's assumption that AT&T and the IRCs would offer different types of services was, in fact, directly contrary to what the IRCs said they proposed to do.

expectations were fulfilled, directed the Chief of its Common Carrier Bureau "to accept for filing applications from both the American Telephone and Telegraph Company and the international record carriers in accordance with this Report and Order." (A-9).

Whatever this delphic directive means, it effectively decides and disposes of a number of the considerations proposed by the IRCs as appropriate issues for decision in later, substantive proceedings. For example, it effectively disposes of the IRCs' claim that if AT&T were permitted to offer basic alternate voice-data service, it would be impossible, in the long run, for the IRCs to offer comparable services, because of the competitive inequality between the carriers. So, too, it effectively disposes of the IRCs' argument that the inevitable elimination of the IRCs' basic alternate voice-data services by reason of AT&T's entry into the market would be detrimental to the public interest.⁶¹ It is basic law that the label of policy-making cannot be used as a means of avoiding factual findings and conclusions with

61. The foregoing analysis is based upon the assumption that the FCC's ordering paragraph permits AT&T to provide basic alternate voice-data service (despite allegations of mutual exclusivity and competitive injury) but does not prohibit the IRCs from filing applications to provide the same service. However, another interpretation has been espoused by AT&T in papers filed with the FCC subsequent to the Order herein, namely, that the Chief of the Common Carrier Bureau has been directed to reject, rather than accept, any application by the IRCs to provide the same service as AT&T.

Thus, in its Reply to Comments filed by the IRCs with regard to the interconnection issue, which had been left unresolved by the Commission's Order, AT&T complained that the IRCs' proposals to obtain interconnection were based on an effort "to provide the same, and not a different, service, as contemplated by the Commission's Order." If such is the proper interpretation of the Commission's Order, it only lends added emphasis to a fundamental defect in the FCC's proceedings which requires reversal in all events, namely, the FCC's failure to make the factual findings (as opposed to hypothetical assumptions) with regard to such matters as to the actual prices each carrier would charge, the details of the particular types of services they would provide and other factual data which would only be available in the applications to provide the service filed pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214.

respect to substantive issues decided in the proceeding which directly affect the rights of the parties. *Delta Airlines, Inc. v. C.A.B.*, 442 F.2d 730 (D.C. Cir. 1970); *Pacific Gas & Electric Co. v. F.P.C.*, 506 F.2d 33 (D.C. Cir. 1974).

In *Delta* the court was faced, as in this case, with an agency decision which ran together a policy question, whether certain routes flown by Southern Airlines should be realigned, with substantive issues as to which carriers should be designated to fly particular routes. The court's explanation of its holding is peculiarly applicable to the instant case:

"This case is illustrative of the errors into which an administrative agency may fall when it does not keep distinct and separate its tripartite functions and powers—executive, legislative and judicial. When the Board began this *Investigation*, it was exercising what was primarily an executive or administrative function in realigning the segments of the existing routes of Southern Airways. To this there was no opposition by other interested parties, and the job the Board was called upon to do was apparently performed in a workmanlike manner. However, when the Board shifted to the consideration of awards on comparative applications for new routes, this, under its own statute, the Administrative Procedure Act, and relevant case law, called for adversary proceedings to take into account the perhaps conflicting public interests of the different communities involved and the certainly conflicting interests of the competing airlines seeking these new routes. In deciding this phase of the case the Board was clearly exercising a judicial function." 442 F.2d at 737 (Emphasis by the court; footnotes omitted).

In *Pacific Gas & Electric* the Court stated:

"A general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The

agency cannot apply or rely upon a general statement of policy because a general statement of policy only announces what the agency seeks to establish as policy. . . . An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy." 506 F.2d at 38-39 (Footnote omitted).

Moreover, since the parties were under the impression that they were engaged in a policy-making proceeding, their comments were confined to identifying general considerations which they felt the Commission's Common Carrier Bureau should be instructed to take into account when it processed subsequent applications to provide alternate voice-data service. Thus, when the FCC unexpectedly converted its policy-making proceeding into an adjudication of substantive matters, the IRCs had not submitted a detailed description of the alternate voice-data services they anticipated offering, nor did the FCC have before it a single formal application pursuant to Section 214 of the Act for authority to offer international alternate voice-data service.⁶² Rather than soliciting such applications, which would have provided it with specific detailed information describing the types of services proposed by the carriers,⁶³ the FCC chose to make its comparison of AT&T and the IRCs, not on the basis of fact, but rather, as noted above, on the basis of its assumptions as to what the various carriers would have proposed had they been asked to submit actual applications.

The FCC's attempt to choose among the carriers on the basis of guesswork and assumption falls far short of the standard the courts have set for reasoned administrative

62. WUI's attempt to submit such an application was rebuffed by the FCC. (A-13)

63. 47 C.F.R. § 63.01.

decision making. Under the case law, an administrative agency's selection of one applicant to receive a contested service authorization cannot be sustained unless the agency has examined and evaluated all the pertinent facts favoring or disfavoring each applicant.⁶⁴ Without actual knowledge of the prices the various carriers would charge, the details of the particular types of services they would provide, or, indeed, any specific information whatsoever as to what the carriers' actual applications to provide alternate voice-data service would contain, the FCC obviously did not have before it adequate factual data to make the careful comparison of the competing applicants which the precedents require. Its determination that it was in the public interest for AT&T to offer basic Dataphone service is therefore not supported by substantial evidence and must be reversed.

The FCC's last-minute attempt to go beyond policy-making not only resulted in a final determination which was unsupported by substantial evidence, but also denied the parties the procedural protections to which they are entitled in a proceeding concerned with substance rather than policy. Under the teaching of *Ashbacher v. F.C.C.*,⁶⁵

64. *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 462 (D.C. Cir. 1967) (the Agency "must consider and make a relative determination and evaluation of all pertinent factors"); *Citizens Communication Center v. F.C.C.*, 447 F.2d 1201, 1212 (D.C. Cir. 1971) ("the statutory right to a full hearing included a decision upon all relevant criteria"); *Johnston Broadcasting Co. v. F.C.C.*, 175 F.2d 351, 356 (D.C. Cir. 1949); *Scripps-Howard Radio, Inc. v. F.C.C.*, 189 F.2d 677, 680 (D.C. Cir. 1951), *cert. den.*, 342 U.S. 830 (1951).

65. 326 U.S. 327 (1945) "*Ashbacher* and its progeny" have been described as "perhaps the most important series of cases in American administrative law," *WLVA, Incorporated (WLVA-TV), Lynchburg, Va. v. F.C.C.*, 459 F.2d 1286, 1302 (D.C. Cir. 1972); *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, 1210-11 (D.C. Cir. 1971). The rule they establish, that competing applications must be considered on a comparative basis, has been called a "fundamental principle of fair play." *Northwest Airlines, Inc. v. C.A.B.*, 194 F.2d 339, 344 (D.C. Cir. 1952); *accord, Community Broadcasting Corp. v. F.C.C.*, 363 F.2d 717, 721 (D.C. Cir. 1966).

the IRCs' allegations, that their own alternate voice-data services would be placed in an untenable competitive position if AT&T were authorized to offer such service, required the FCC to consider applications from AT&T and the IRCs contemporaneously, on a comparative basis, before making a final determination that AT&T would be permitted to offer basic alternate voice-data service.⁶⁶ By deciding that AT&T should be authorized to provide basic Dataphone service, while at the same time deferring consideration of the IRCs' status, the FCC committed a fundamental violation of the *Ashbacher* rule.

Indeed, the FCC's Notice of Inquiry did not even give the IRCs' notice that its policy investigation would result in a final determination authorizing AT&T to offer basic alternate voice-data service. This failure to tell the parties what was at stake in the proceeding, which prevented the IRCs from taking steps to protect their *Ashbacher* rights, is in itself a basic error which requires reversal. Thus, in a directly analogous case, this Court reversed the C.A.B.'s award of a passenger route to one airline because other potential applicants had not been given adequate notice that such an award might result from the agency investigation in question. As the Court there observed:

"A party's right to know what issues of interest to him may be determined in a proceeding in which he is participating is an absolute requisite of elemental fairness." *Mohawk Airlines, Inc. v. C.A.B.*, 412 F.2d 8, 13 (2d Cir. 1969).

Moreover, having determined to reach a final decision permitting AT&T to offer Dataphone service, the FCC had

66. This Court has expressed the *Ashbacher* rule in the following terms:

"[I]f an agency's award of one application for operating authority would be mutually exclusive as a matter of fact with the award of others before the agency, the competing applications must be considered contemporaneously." *Mohawk Airlines, Inc. v. C.A.B.*, 412 F.2d 8, 9 (2d Cir. 1969).

an obligation not only to notify the IRCs that such a determination would be forthcoming, but also to give them an opportunity to contest the factual assumptions on which it was acting. The choice among competing applicants for a service authorization requires some sort of adversarial procedure which enables the applicants to test the validity of the proposals and factual assertions put forward by their competitors:

"The requirement for a comparative proceeding means all the give-and-take of contesting parties, including cross examination, rebuttal, participation in prehearing proceedings, objections, briefs and arguments as contesting parties." *Delta Airlines, Inc. v. C.A.B.* 442 F.2d 730, 732 n. 8 (D.C. Cir. 1970), quoting *Delta Airlines, Inc. v. C.A.B.*, 228 F.2d 17, 22 (D.C. Cir. 1955).⁶⁷

The notice-and-comment procedure followed by the FCC below is no substitute for the adversarial process,⁶⁸ and cannot sustain its choice of AT&T.

67. Since the Commission was considering a single communications service of primary interest only to a handful of known carriers which the FCC identified by name in its Notice of Inquiry, the proceeding was clearly more nearly adjudicatory than legislative in tenor, entitling the participants to the procedural protection of adjudicative procedures. *London v. Denver*, 210 U.S. 373 (1908); compare *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). See generally, e.g., *U.S. v. Florida East Coast Railway Co.*, 410 U.S. 224, 244 (1973); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971).

68. See *Zenith Radio Corp. v. F.C.C.*, 211 F.2d 629, 634 (D.C. Cir. 1954) which holds that the FCC could not treat an applicant's failure to participate in a related rulemaking proceeding as a waiver of its right to a comparative hearing. Compare, with the instant case, *American Airlines, Inc. v. C.A.B.*, 359 F.2d 624, 631 (D.C. Cir. 1966), cert. den., 385 U.S. 843 (1966):

"We are not here concerned with a proceeding that in form is couched as rule making, general in scope and prospective in operation, but in substance and effect is individual in impact and condemnatory in purpose. The proceeding before us is rule making both in form and effect. There is no individual action here masquerading as a general rule."

In short, no matter how appropriate the FCC's actions may have been for a proceeding limited to the formulation of policy, it is clear the FCC erred when it ventured beyond policy-making and made a substantive choice between the competing applicants.

CONCLUSION

For the reasons set forth herein and in the Petition of ITT World Communications Inc. for Review, the Report and Order of the Federal Communications Commission, released January 19, 1976, should be reversed.

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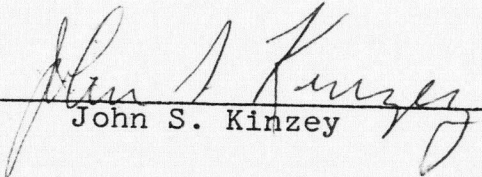
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